88-1018

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No.: _____

IN THE

Supreme Court of the United States

October Term, 1988

JOSEPH N. GALLO and JOSEPH ARMONE,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Did the Court of Appeals Misapprehend the Holding of This Court in *Kastigar v. United States* in Upholding the Conviction of Joseph N. Gallo and Refusing to Dismiss the Superseding Indictment Against Him?

2. Did the Court of Appeals Err in Holding That Joseph Armone Was Not Denied a Fair Trial and Due Process of Law by the Evidentiary Ruling of the Trial Judge Which Allowed a Series of Phone Messages to Be Received in Evidence?

List of the Parties

Apart from those named in the caption of this Petition, the other parties involved in the trial were Anthony Vitta and Salvatore Migliorisi.

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Joseph N. Gallo and Joseph Armone (hereinafter "the Petitioners") jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the Petitioners by the United States District Court for the Eastern District of New York (Hon. Jack B. Weinstein) and denying Rehearing with Suggestion for Rehearing In Banc.

Opinions Below

The opinion and order of the Court of Appeals dated November 29, 1988, which affirmed the Petitioners' judgment of conviction appears in Appendix A, *United States v. Gallo*, et al., ____ F.2d ____ (2d Cir. 1988, docket no. 88-1066).

The order of the Court of Appeals dated January 4, 1989, which denied Rehearing with Suggestion for Rehearing In Banc appears in Appendix B. The order of the Court of Appeals dated January 18, 1989 which stayed the mandates of the Petitioners pending timely application to this Court for a Writ of Certiorari appears in Appendix C.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved in This Case

Amendment V, United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself,; nor be deprived of life, liberty, or property, without due process of law,; nor shall private property be taken for public use, without just compensation.

Federal Rules of Evidence, Rules 803(24) and 804(5):

The following are not excluded by the hearsay rule ....

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can

procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Statement of the Case

Count One of the superseding indictment charged that the Petitioners and others had conspired to participate in the affairs of a racketeering enterprise (RICO) within the Eastern District of New York from January, 1967 to the filing of the superseding indictment in 1986 in violation of 18 U.S.C. § 1961(d). The "enterprise" alleged was the "Gambino Crime Family." In addition to the conspiracy count, the superseding indictment charged twelve substantive counts.

Following a jury trial, Gallo was convicted of the conspiracy count and also of two counts of aiding and abetting bribery in violation of 18 U.S.C. § 201(b) and of one count of aiding and abetting interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952.

Armone was convicted of the conspiracy count, of one count of aiding and abetting bribery in violation of 18 U.S.C. § 201(b), of one count of aiding and abetting interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952, of one count of aiding and abetting extortion and of one count of conspiring to extort in violation of 18 U.S.C. § 1951(a).

Final judgments of conviction were entered on February 16 and 22, 1988. Gallo was sentenced to a term of imprisonment of ten years and fined a total of $380,000.

Armone was sentenced to a term of imprisonment of 15 years and fined a total of $820,000. Gallo remains under house arrest pending the hearing and determination of this Petition. Armone is incarcerated.

A. The Government's Proof At Trial.

The proof at trial, as offered by the Government against the Petitioners, dealt essentially with four defined areas: establishment of the "Gambino crime family" and hence, the "enterprise" alleged in the superseding indictment; establishment of the alleged Stewart Color Laboratories extortion by Armone; establishment of the alleged loansharking and collection of unlawful debts by Gallo;[1] and establishment of the alleged bribery and unlawful acts by Gallo and Armone in interstate commerce concerning the efforts to transfer prison inmates.

1. The Alleged "Enterprise" -- The "Gambino Crime Family."

The superseding indictment alleged that there existed a "Gambino Crime Family" which conspired to engage in diverse "areas" of illegal activity through a "pattern of racketeering activity." It was further alleged that the "Gambino Crime Family" had a well-defined structure. Hence, the "Gambino Crime Family" was alleged to be the RICO "enterprise." Gallo was alleged to be "consiglieri" of the "family" and Armone, "capo" in the "family" and "boss" of a "crew" in the "family."

To establish the existence and structure of the "Gambino Crime Family" -- and hence, the RICO "enterprise" -- the Government relied, essentially, upon electronically intercepted evidence and the "background" testimony of numerous FBI agents as to what the intercepted conversations meant based upon their long-standing intensive surveillance of the alleged speakers.

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[1] Since Gallo was acquitted of loansharking and of the collection of unlawful debts, we will not dwell upon the Government's proof concerning these crimes.

2. *The Alleged Extortion of Stewart Color Laboratories.*

To establish the alleged extortion of Stewart Color Laboratories against Armone, the Government relied upon the testimony of George Yudzevich, a career criminal who had spent a substantial portion of his forty-six years in jail.

Yudzevich testified that in the mid-1970's he formed a collection agency called "Globe Collections" and began to collect debts for companies that had contracted with Globe. One such client was Stewart Color Laboratories, a photographic laboratory having more than 150 non-unionized employees.

According to Yudzevich, around the time he was collecting for Stewart, he met the co-defendant Vitta. Yudzevich stated that Vitta informed him that he was a "loanshark" in the "Gambino family" and that "Joe Piney" (identified in open court as Armone), was his "skipper." Yudzevich testified, he met with Vitta and the co-defendant Migliorisi and they spoke about getting their "foot in the door" at Stewart Laboratories.

Yudzevich then described how Stewart Labs had been "shaken down," how it had paid money, and the manner in which the money had been divided.

3. *The Alleged Bribery and Unlawful Acts in Interstate Commerce Concerning Prison Inmates Persico and Gallo.*

To establish the alleged bribery and unlawful interstate travel of a federal official by the Petitioners to effect the transfers of inmates Carmine Persico and Joseph C. Gallo (the Petitioner Gallo's son), the Government relied essentially upon the testimony of oft-convicted career criminal Joseph "Joe Dogs" Iannuzzi and upon tapes and the testimony of FBI surveillance agents

which, the Government asserted, corroborated Iannuzzi's testimony.[2]

Iannuzzi testified that in 1971 he became friends with Thomas Agro whom he described as a "loanshark" in the "Gambino family." Having concluded that he was only getting a "bone" from Agro, by 1975, Iannuzzi, himself, began to borrow money from Agro which "he put in the streets for three to five points."

Iannuzzi, however, had difficulty repaying Agro on the loans he had periodically taken and by 1980, owed Agro $42,000. Iannuzzi testified that he avoided Agro's calls, but on January 19, 1981, finally agreed to meet Agro at "Don's Pizza." As he entered, he was hit from behind and woke up in a hospital. There, he was visited by a federal agent and shortly thereafter, agreed to cooperate with the FBI. This cooperation culminated in a number of indictments including the superseding indictment against the Petitioners concerning their alleged criminal efforts to effectuate through Iannuzzi, and his "contact" in the Government, "favors" as to inmates Persico and Joseph C. Gallo; to wit, their prison transfers in exchange for the payment of money.[3]

B. The Defense Case.

Neither Gallo nor Armone testified in their own defense. Gallo and Armone, as well as their co-defendants, did however call witnesses and introduce documentary evidence and tape recordings.

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[2] Armone was acquitted of the "predicate act" and substantive count relating to the transfer of inmate Persico.

[3] The government conceded that Iannuzzi's alleged "contact" was, in fact, fictitious.

REASONS FOR GRANTING THE WRIT

I.

The Affirmance by the Court of Appeals of Gallo's Conviction and Its Refusal to Dismiss the Superseding Indictment Misapprehended the Holding of This Court in *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

It must be recalled that in the case at bar, the superseding indictment charged that the racketeering conspiracy commenced in or about January, 1967 and continued to the filing of the superseding indictment in 1986. The superseding indictment further alleged that Gallo had been the "consiglieri" or counselor for the "Gambino crime family" and that this "family" was a racketeering enterprise which had conducted its affairs through a litany of alleged criminal acts.

To lay the foundation for his pretrial *Kastigar* claims, Gallo established that during the time span alleged in the superseding indictment, he had testified at least five times before federal and New York State grand juries pursuant to grants of transactional or use immunity and that in these appearances, he had been questioned about his association with the "Gambino crime family" and/or his co-conspirators and certain of the events for which he had been indicted. He further claimed that Case Agent Andris Kurins had been familiar with his testimony at his grand jury appearances. Thus, in the District Court, Gallo demonstrated that he had made the following grand jury appearances:

1. September 7, 1967 before a Queens County State Grand Jury;
2. In or about 1971 before a Federal Grand Jury in the Southern District of New York;
3. In or about 1972 before a Kings County State Grand Jury;
4. In or about 1974 before a Federal Strike Force Grand Jury in the Southern District of New York;
5. On February 1, 1984 before a New York County State Grand Jury.

In opposing Gallo's motion in the District Court to dismiss the superseding indictment, the Government furnished the affidavit of Case Agent Kurins.

After considering the affidavits of the parties as well as Kurins' testimony in which he admitted he had questioned Gallo on at least 20 occasions, the trial judge denied Gallo's pretrial motion to dismiss the superseding indictment, with leave to renew it following trial, "when we have a better idea of what comes in against Gallo." The Order of the trial judge dated April 20, 1987 appears in Appendix D.

Following trial, Gallo renewed his motion to dismiss the superseding indictment. At the hearing, the Government relied upon affidavits furnished by three Department of Justice attorneys assigned to the case as well as upon their testimony. All three prosecutors asserted that the Government had not made any direct or derivative use of Gallo's grand jury testimony.

At the conclusion of the hearing, the trial judge refused to dismiss the superseding indictment against Gallo, concluding that "[a]ll the information that was used by the Government in this prosecution came to its attention from independent sources." The decision of the trial judge appears in Appendix E.

Notwithstanding the finding of the trial judge, Gallo demonstrated that *inexplicably*, transcripts of his appearances before grand juries in 1971, 1972, and 1974 had *never* been provided to him despite due demand. Thus, although Gallo was provided with a copy of his testimony before a Queens County State Grand Jury on September 7, 1967, and a copy of his testimony before a New York State Grand Jury on February 1, 1984, he was never provided, despite due demand, with transcripts of his appearances before federal and state grand juries in 1971, 1972, and 1974.

In considering Gallo's contentions that the trial judge had erred in refusing to dismiss the superseding indictment, the Court of Appeals elected to confine its

observations *solely* to Gallo's 1967 testimony before a Queens County State Grand Jury and omitted mention of Gallo's other grand jury appearances as an immunized witness.

This analysis by the Court of Appeals, we submit, thoroughly misapprehended the holding of this Court in *Kastigar v. United States*, *supra*, which requires a broad inquiry as to *all* of Gallo's grand jury appearances.

Furthermore, Gallo submits that even if the Court of Appeals was correct in limiting its independent review of the record under *Kastigar* solely to Gallo's 1967 testimony before a State Grand Jury, its conclusion that the superseding indictment against Gallo need not be dismissed is erroneous since such testimony inevitably infected the very core of the Government's investigation of Gallo for almost two decades. Moreover, and in any event, the unexplained production of transcripts of three separate grand jury appearances by Gallo, at the least, warrants an evidentiary hearing pursuant to this Court's holding in *Kastigar*.

Gallo thus respectfully submits that, on the present record, the Government has plainly failed to establish that the evidence presented to the grand jury against him in the instant case was not tainted by its use, directly or indirectly, of his testimony as an immunized witness before five separate grand juries spanning a time period between 1967 and 1984. The determination by the Court of Appeals, therefore, to uphold Gallo's conviction warrants the issuance of a Writ of Certiorari.

II.

The Court of Appeals Erred in Holding That Joseph Armone Was Not Denied a Fair Trial and Due Process of Law by the Evidentiary Ruling of the Trial Judge Which Allowed a Series of Phone Messages to Be Received in Evidence.

During its direct case concerning the alleged extortion of Stewart Color Laboratories, the Government introduced a voluminous series of "telephone answering records" at Stewart Labs which were collectively marked as GX 680. From these, the Government culled "selected messages" which it specifically offered in evidence as GX 680A. More particularly, the Government offered approximately 25 telephone message sheets that had been extracted from GX 680 which, it asserted, indicated that "Joe Piney" had called the defendant Vitta at Stewart Labs and had left a simple message, *i.e.*, for him to call "Piney" back at a certain time and place. The Government contended that, within the context of a criminal conspiracy prosecution, this type of proof was evidence of relationship between Armone and Vitta and thus, should be received.

The trial judge acknowledged that the GX 680 phone messages posed a "problem" and in temporarily agreeing to sustain the objection by the defense to their receipt in evidence observed that,

> "The business records come in. But the truth of the statement made in those business records when there are statements made by non-members of the business is what we are concerned with.
>
> * * * *

> We are assuming the accuracy of the entry. That is, that somebody called saying he was Mr. X. The question is, is the person who said they were Mr. X, Mr. X. Now just think about it and deal with it" (T.2357-2360).[1]

Subsequently, however, despite acknowledging that the question really is "trustworthiness," the trial judge nevertheless, allowed the selected GX 680 phone messages to be received in evidence under the 'catchall exceptions" to 803 and 804 of the Federal Rules of Evidence (T.4866). In so doing, the trial judge specifically invited the Court of Appeals to write an opinion on the point (T.4869). Nevertheless, although raised on appeal, the Court of Appeals did not address the issue.

Armone submits that the evidentiary ruling of the trial judge constituted an abuse of his discretion and denied him a fair trial and due process of law. A Writ of Certiorari should, therefore, issue.

In Rules 803 and 804 of the Federal Rules of Evidence, the "hearsay exceptions" were promulgated. Rule 803 lists 23 categories of evidence which are not excluded by the hearsay rule even though the declarant is available as a witness and Rule 804 lists 4 areas of testimony which are not excluded by the hearsay rule even though the declarant is unavailable as a witness. The final category in both Rules 803 and 804 is the "catchall exception" which states:

> The following are not excluded by the hearsay rule....
>
> > A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the

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[1] In specifically addressing the message to Vitta from "Federico Trucking," the trial judge asked the rhetorical question of the Government, "But how do you know it was Federico calling." Likewise, as to the message from "Joe Piney" the court below observed, "How do you know it's Joe Piney? It might have been someone who said he was 'Piney' " (T.2357). "T" is a reference to the trial transcript.

> court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

It is significant that, as is pointed out in *Weinstein's Evidence*, pp. 803-370, Congress had considerable difficulty with the "catchall provision" and indeed, it was initially eliminated by the House of Representatives. Moreover, even when it was adopted, the legislative history to Rule 803(24) instructs that,

> "It is intended that the residual hearsay exceptions will be used very rarely and only in exceptional cases. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions...." *F.R.Evid.*, Rule 803, 28 U.S.C.A. Historical note.

Aside from the legislative history cautioning against abuse, in the instant case, the Government's 680 "phone messages" were plainly unreliable. Compare, for example, the utter absence of proof at bar as to the genesis of the Exhibit 680 "phone messages" with the proof of "trustworthiness" adduced, for example, in *United States v. Karl*, 804 F.2d 441 (8th Cir. 1986), where a receptionist

authenticated and attested to the reliability of a ledger received in evidence; or in *United States v. Scallion*, 533 F.2d 903 (5th Cir. 1976), where in the case of each record, a custodian could testify that the record had, in fact, been kept in the regular course of the hotel's business or in *United States v. Lieberman*, 637 F.2d 95 (2d Cir. 1980), where hotel records were excluded because the Government, as here, had not established their trustworthiness.

CONCLUSION

FOR THE FOREGOING REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING THE JUDGMENT OF CONVICTION ENTERED AGAINST THE PETITIONERS.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 63, 96, 97, 195 August Term, 1988
(Argued: September 26, 1988 Decided: Nov. 29, 1988)
Docket Nos. 88-1066, -1073, -1074, -1082

UNITED STATES OF AMERICA,

Appellee,

-v.-

JOSEPH N. GALLO, JOSEPH ARMONE, JOSEPH CORRAO, ROBERT DIBERNARDO, JAMES FAILLA, JOSEPH ZINGARO, THOMAS AGRO, ROBERT DESIMONE, JACK GIORDANO, ANGELO RUGGIERO, ANTHONY VITTA, GEORGE DALY, LOUIS GIARDINA, SALVATORE MIGLIORISI, JULIE MIRON and MILDRED RUSSO,

Defendants,

ANTHONY VITTA, JOSEPH ARMONE, SALVATORE MIGLIORISI, JOSEPH GALLO,

Defendants-Appellants.

Before:

OAKES, MINER and ALTIMARI,

Circuit Judges.

Appeal from judgments of conviction following a jury trial entered in the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*).

Affirmed.

Appendix A
Opinion of the United States Court of Appeals

JOHN L. POLLOK, New York, NY (Todtman, Hoffman, Epstein, Young, Goldstein, Tunick & Pollok, New York, NY, of counsel), *for defendants-appellants Gallo and Armone.*

RICHARD A. REHBOCK, New York, NY, *for defendant-appellant Vitta.*

STANLEY M. MEYER, New York, NY (DePetris & Meyer, Esqs., New York, NY, of counsel), *for defendant-appellant Migliorisi.*

MAURY S. EPNER, Attorney, Department of Justice, Washington D.C. (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Douglas E. Grover, Special Attorney, Organized Crime Strike Force, Brooklyn, NY, of counsel), *for appellee.*

ALTIMARI, *Circuit Judge:*

Defendants-appellants Anthony Vitta, Joseph Armone, Salvatore Migliorisi, and Joseph Gallo appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York following a jury trial before Judge Jack Weinstein. In a thirteen count indictment, defendants were charged with various offenses arising from their participation in a racketeering enterprise. Defendant Vitta was convicted of one count of conspiring to engage in racketeering in violation of 18 U.S.C. § 1962(d), one count of obstructing justice in violation of 18 U.S.C. § 1503, one count of aiding and abetting extortion and one count of conspiring to extort in violation of 18 U.S.C. § 1951(a). Vitta was sentenced to a total of 10 years of imprisonment and was fined $250,000. Defendant Armone was convicted of one count of conspiring to engage in racketeering in violation of 18 U.S.C. § 1962(d), one count of aiding and abetting bribery in violation of 18 U.S.C. § 201(b), and one count

of aiding and abetting interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952, one count of aiding and abetting extortion and one count of conspiring to extort in violation of 18 U.S.C. § 1951(a). Armone was sentenced to a total of 15 years of imprisonment and was fined $820,000. Defendant Migliorisi was convicted of one count of obstructing justice in violation of 18 U.S.C. § 1503, one count of aiding and abetting extortion and one count of conspiring to extort in violation of 18 U.S.C. § 1951(a). Migliorisi was sentenced to a total of three years of imprisonment and was fined $25,000. Defendant Gallo was convicted of one count of conspiring to engage in racketeering in violation of 18 U.S.C. § 1962(d), two counts of aiding and abetting bribery in violation of 18 U.S.C. § 201(b), and one count of aiding and abetting interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952. Gallo was sentenced to a total of 10 years of imprisonment and was fined $380,000.

On appeal, Armone and Gallo contend that there was insufficient evidence to convict them of the bribery charge, there was insufficient evidence to convict Armone of the extortion charges, the government made improper use of immunized testimony given by Gallo before a state grand jury, evidence developed from the electronic surveillance of two co-conspirators should have been suppressed, and that the district court abused its discretion in limiting cross-examination of a government witness. Migliorisi contends that there was insufficient evidence to convict him of the extortion charges, and that the district court abused its discretion in denying him a separate trial. For the reasons stated below, we affirm the judgments of conviction as to all defendants on all counts.

Appendix A
Opinion of the United States Court of Appeals

BACKGROUND

Vitta, Armone, Migliorisi, and Gallo were charged with participation in the affairs of the Gambino Crime Family racketeering enterprise. As originally constituted, the case below involved 16 defendants charged with the commission of various acts arising from their involvement with the "Family." In response to motions made by several defendants, however, seven separate trials were held. *See United States v. Gallo*, 668 F. Supp. 736 (E.D.N.Y. 1987). Evidence at trial, which included electronic surveillance gathered from the homes and phones of co-defendant Anthony Ruggiero and unindicted co-conspirator Paul Castellano, showed the Family to be organized in a hierarchical fashion. Most of the Family's criminal activity is carried out by crews of "soldiers," often with the assistance of "associates," who are not members of the Family. Each crew is directed by a "captain." The captains, in turn, report to a "consiglieri," who is the third-ranking member of the Family, with responsibility for day-to-day operations. Family rules dictate that a member may not engage in any criminal activity without the approval of his superior. The government's evidence at trial established that Gallo was consiglieri to the Family, Armone was the captain of a crew, Vitta was a soldier in Armone's crew, and Migliorisi was an associate of Vitta.

The indictment charged Vitta, Armone, and Gallo with conspiring to conduct and participate in the conduct of the affairs of the Gambino Family through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d). The alleged predicate acts of racketeering included, *inter alia*, bribery, obstruction of justice, interstate travel in aid of racketeering, extortion, and extortionate extension and collection of credit. In addition, defendants were charged with the substantive crimes which were alleged as predicate acts of racketeering.

At trial, Gambino Family associate Joseph Iannuzzi testified on behalf of the government regarding charges of bribing federal prison officials. Iannuzzi, who had a history of loansharking involvement with Armone crew member Thomas Agro, agreed to cooperate with an FBI investigation soon after he was severely beaten for failing to make timely payments on his debt to Agro. Iannuzzi testified that Dominic Cataldo, a recently convicted soldier of the Colombo Crime Family, had approached him and asked whether Iannuzzi could arrange through a "connection" in Washington, D.C., to have Cataldo assigned to a minimum security prison. In his undercover capacity, Iannuzzi determined that Cataldo was already so assigned. Thereafter, Iannuzzi contacted Cataldo, informed him of the assignment, and credited his connection for the arrangement.

In accordance with Family protocol, Cataldo subsequently contacted Agro to receive permission to have Iannuzzi perform another favor for a member of the Colombo Family. This time, Cataldo asked Iannuzzi to have his connection arrange the transfer of Carmine Persico, the boss of the Colombo Family, from a prison in Texas to the federal penitentiary in Danbury, Connecticut. One month later, Iannuzzi informed Cataldo that he would be able to arrange the Persico transfer, at a cost of $40,000, $25,000 of which was to go to Iannuzzi's connection. Persico was subsequently transferred at the request of the FBI. The Colombo Family, however, did not immediately pay for the favor.

In the meantime, Iannuzzi was requested by Agro to perform another favor, this time to effect the transfer of defendant Gallo's son. The Gambino Family feared that if Iannuzzi's connection was not paid for the Persico transfer, he would refuse to perform the favor for Gallo. Thereafter Agro, Gallo, and their superiors in the Gambino Family met with the Colombo Family counterparts, and it was agreed that the Colombos would pay

$20,000 for the Persico transfer. To insure that his own favor would be accomplished, Gallo provided $20,000 in advance so that Iannuzzi could arrange the transfer of his son. Subsequently, Iannuzzi was given $20,000 by Cataldo in satisfaction of the Colombo Family obligation. In a conversation with Armone, Iannuzzi was told that he was doing "a real good thing" for which he would be rewarded. Agro later told Iannuzzi that he was made a "member" of Armone's crew.

George Yudzevich, who associated with the Colombo and other crime families, testified on behalf of the government regarding the extortion charges. Yudzevich operated a debt-collection agency and one of his clients was the Stewart Color Laboratory, a commercial photography business co-owned by Jerry Schochet. Testimony at trial revealed that Yudzevich, along with Vitta and Migliorisi, approached Schochet to try to "get [a] foot in the door of Stewart Color." Vitta told Schochet that he would obtain legal assistance if Yudzevich ever encountered problems collecting debts for Stewart Color, and asked how much this service was worth to Schochet. Schochet's response was less than what Vitta had hoped for, prompting Vitta to threaten to "crack [Schochet's] head open [with an ashtray] so he [could] watch the blood come down." An agreement was then reached, whereby Schochet would pay, in cash, $1,000 per week to Vitta. Once each week for the next two weeks, Yudzevich and Migliorisi visited Schochet and collected an envelope filled with money. This money was given to Vitta, who kept some for himself, paid some to Yudzevich and Migliorisi, and paid the remainder to his superiors in the Family including Armone. After two weeks, Schochet indicated that he could not make the payments without placing someone on the payroll. Thereafter, Vitta, and later Migliorisi, were placed on the Stewart Color payroll.

DISCUSSION

A. Sufficiency of the evidence regarding the attempted bribery of public officials.

Armone and Gallo contend that there was insufficient evidence relating to the bribing of public officials to support either a conviction on substantive bribery charges, or a finding that bribery constituted a predicate act to a pattern of racketeering. They argue that because the government did not prove the existence of a federal official to whom bribes were actually paid, proof that payment was made to a "connection in Washington" was not sufficient to prove the intent to bribe a public official. "[A] defendant who contends that the evidence was insufficient to convict him bears a very heavy burden." *United States v. Pedroza*, 750 F.2d 187, 198 (2d Cir. 1984). In determining the sufficiency of evidence to support a conviction, a reviewing court must "view the evidence in the light most favorable to the government[,] ... credit every inference that could have been drawn in the government's favor, and uphold the conviction if, from the inferences reasonably drawn, the jury might fairly have concluded that the defendant was guilty beyond a reasonable doubt." *United States v. Walker*, 835 F.2d 983, 987 (2d Cir. 1987) (citations omitted).

Whether or not there was a federal official to whom bribes were actually paid is not determinative of the issue of intent. As we have stated, 18 U.S.C. § 201(b) "makes *attempted* bribery a crime, and so long as a bribe is 'offered or promised' with the requisite intent 'to influence *any* official act' the crime is committed." *United States v. Jacobs*, 431 F.2d 754, 760 (2d Cir. 1970) (emphasis in original), *cert. denied*, 402 U.S. 950 (1971). To find such intent, the public official who is the target of the bribe need not be aware of the bribe, *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980), and, in fact, need not even exist. *See United States v. Rosner*,

485 F.2d 1213, 1216 (2d Cir. 1973) (affirming conviction where defendant attempted to funnel money to fictitious official), *cert. denied*, 417 U.S. 950 (1974). Armone and Gallo argue that payment of money to a "contact in Washington" could easily be understood to mean payment to a lobbyist or attorney. Evidence at trial, however, showed that defendants talked in codes, covered their "paper trail," and otherwise went to great lengths to keep secret their payments to a "connection" to buy such "favors" as the transfer of federal prisoners. Based on this evidence, a rational jury could fairly have concluded beyond a reasonable doubt that Armone and Gallo intended to bribe a public official.

B. Sufficiency of the evidence regarding the extortion of Stewart Color Laboratory.

Armone and Migliorisi each contend that there was insufficient evidence to convict them of extorting the Stewart Color Laboratory. Armone argues that the evidence against him was insufficient because George Yudzevich, the government's primary witness regarding the extortion charges, admitted during cross-examination that he had never "discussed business" with Armone and that he had no personal knowledge as to whether Armone was aware of the extortion. Migliorisi argues that each of the witnesses who testified against him were not credible, and thus, there was insufficient evidence to render a conviction. As stated above, a defendant who contends that evidence was insufficient to convict him bears a very heavy burden. Neither Armone nor Migliorisi have met this burden. The record is replete with evidence of the structure of the Gambino Crime Family and Armone's role as captain of a Gambino crew. Family protocol required Vitta to receive the approval of Armone, his captain, prior to engaging in criminal activity such as the extortion of a photography lab. In addition, wiretap evidence from the home of

Family boss Paul Castellano showed Armone dutifully reporting to his superior that Vitta "got" Stewart Color Laboratory. Viewing this evidence and the inferences which might be drawn therefrom in the light most favorable to the government, a reasonable jury could fairly conclude beyond a reasonable doubt that Armone was guilty.

Migliorisi's argument that there was insufficient evidence to convict him due to the lack of credibility of the witness who testified against him is without merit. In an examination of the evidence to determine whether sufficient proof was adduced for the jury to find guilt beyond a reasonable doubt, "all issues of credibility must be considered questions solely within the jury's province." *United States v. Singh*, 628 F.2d 758, 766 (2d Cir.), *cert. denied*, 449 U.S. 1034 (1980). The jury was entitled to believe the witnesses who testified against Migliorisi, and we will not disturb their finding.

C. Use of immunized grand jury testimony.

Gallo contends that his conviction should be reversed and the indictment against him dismissed because the government used immunized grand jury testimony to build the case against him. Specifically, Gallo argues that his appearance, in 1967, before a Queens County, New York grand jury entitled him to transactional immunity because the 1967 investigation was actually a joint state-federal operation. In the alternative, Gallo asserts that even if only "use" immunity applies, the government improperly used his testimony. Both arguments, however, are without merit. Prior to the enactment of 18 U.S.C. § 6002 in 1970, the federal government could compel the testimony of a grand jury witness only pursuant to a grant of transactional immunity. *See Kastigar v. United States*, 406 U.S. 441, 451-52 (1972). The 1967 testimony, however, was given before a *state*

grand jury. Although Gallo contends that the Queens District Attorney's Office was acting either in conjunction with, or under the direction of the FBI, the record contains no evidence that such was the case. Thus, Gallo was entitled to no more than use and derivative use immunity.

Whether the government made use of the grand jury testimony is an issue of fact, which the district court thoroughly examined by holding two *Kastigar* hearings, one before and one after trial. Accordingly, the district court's findings are not to be reversed unless clearly erroneous. *See United States v. Gaviria*, 740 F.2d 174, 182 (2d Cir. 1984). Our independent review of the record reveals ample support for Judge Weinstein's finding that "[a]ll the information that was used by the government in this prosecution came to its attention from independent sources." Gallo has been the subject of government investigation and surveillance for over twenty years. Events, such as a 1966 meeting at a Queens restaurant, which Gallo claims became known to the government due to his grand jury testimony, were actually the subject of police surveillance. Agents involved in the current investigation testified that they did not even know of Gallo's grand jury appearance until Gallo raised it as an issue before the trial court. Furthermore, it should be noted that the nature of Gallo's grand jury testimony makes any claim of its direct or indirect use untenable. The testimony consisted mostly of denials and ambiguous answers. In short, there was nothing to use. The findings of the district court were not clearly erroneous.

D. Use of electronic surveillance.

Armone and Gallo contend that evidence and investigative leads derived from the electronic surveillance of co-conspirators Ruggiero and Castellano should have been suppressed for a variety of reasons. Specifically,

they argue that the Castellano surveillance should be suppressed because probable cause was lacking to authorize such a search, and there was too long a delay between the granting of the order authorizing the wiretaps and their actual installation. They assert that the Ruggiero surveillance should be suppressed because it was more extensive than authorized. Finally, Armone and Gallo contend that the evidence from both locations should be suppressed because there were improper delays in sealing the tapes obtained by electronic surveillance. We find all of these arguments to be without merit.

Between November 12, 1982 and July 28, 1983, eight court orders were issued by United States District Court Judges Bramwell and McLaughlin authorizing the government to conduct electronic surveillance of Castellano's home. Since FBI agents found it difficult, if not impossible, to enter Catellano's home to install the listening devices immediately after the granting of the first three orders, the actual surveillance did not begin until after March 7, 1983. Tapes obtained by electronic surveillance were sealed from 3 to 36 days after the expiration of the individual authorizing orders. All of the tapes were sealed prior to the expiration of the final authorizing order on August 4, 1983. In a related case, co-defendant Joseph Corrao made the same claims with regard to the Castellano surveillance as are advanced by appellants here, and they were rejected by United States District Court Judge Kram. *United States v. Corrao*, No. 86 Cr. 0556 (S.D.N.Y. Apr. 8, 1988) (mem.). The trial court relied on *Corrao* in denying appellant's motion to suppress the Castellano surveillance.

1. Probable cause

An order authorizing electronic surveillance may be issued upon showing that communications pertaining to a designated offense will be obtained, and that there is

probable cause to believe an offense has been, or is about to be committed. 18 U.S.C. §§ 2518(1)(b)(i) & (3)(a). The standard of probable cause governing electronic surveillance is the same as for any other search warrant. *United States v. Fury*, 554 F.2d 522, 530 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978). We are guided by the principle that a "determination of probable cause should be paid great deference by reviewing courts." *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (citation omitted). Thus, our role is merely to determine whether the issuing court had a "substantial basis" for concluding that electronic surveillance would uncover evidence of wrongdoing. *Id.* at 236-39.

We find that a substantial basis existed for the district court to conclude that a wiretap of the Castellano home would uncover evidence of unlawful activity. Electronic surveillance at another location provided probable cause to believe that organized crime activity was taking place at the Castellano home. A number of FBI confidential informants provided evidence of criminal activity and discussions of criminal activity occurring there. One informant, who had been cooperating with the FBI for eight years, stated that he personally took part in discussions of illegal activity at the Castellano home. In addition, physical observation of the home revealed the frequent presence of those alleged to be involved in the criminal activity. Viewing all of the evidence in its entirely, and testing it in common sense fashion, *see United States v. Harris*, 403 U.S. 573, 577 (1971), we conclude that probable cause existed to order electronic surveillance of the Castellano home.

2. Delay

The government's delay in initiating the Castellano surveillance does not provide grounds for its suppression.

The affidavit submitted by the government stated that "it was impractical, if not physically impossible, for Special Agents of the FBI to effect surreptitious entry into [the Castellano home] for the purpose of installing interception devices, without significant likelihood of detection." We find this to be an adequate explanation for the delay. We further find that probable cause for the initial order authorizing electronic surveillance did not become stale during the delay, and that each extension of the order was independently supported by probable cause. We previously have determined that "the principal factors in assessing whether or not the supporting facts have become stale are the age of those facts and the nature of the conduct alleged to have violated the law." *United States v. Martino*, 664 F.2d 860, 867 (2d Cir. 1981), *cert. denied*, 458 U.S. 1110 (1982). The supporting affidavits in this case presented "a picture of continuing conduct," *id.*, as opposed to an isolated instance of wrongdoing. Thus, "the passage of time between the last described act and the presentation of the application becomes less significant." *Id.* Furthermore, probable cause was "freshened" by visual surveillance of the Castellano home which revealed frequent new visits by Castellano's alleged criminal associates. The district court's refusal to suppress the fruits of the Castellano surveillance because of the delay in its initiation was proper.

3. Compliance with authorization

Armone and Gallo also challenge the use of evidence derived from electronic surveillance of the home and phone of co-defendant Angelo Ruggiero. Between November 1981 and June 1982, six orders were issued by the United States District Court for the Eastern District of New York authorizing the government to conduct electronic surveillance of the home and phone of Ruggiero. Neither Armone nor Gallo were named as targets of the

surveillance. The order issued on April 5, 1982 specified, *inter alia*, that the "[i]nterception ... be suspended immediately when it is determined ... that none of the named interceptees ... are participants in the oral or wire conversations." Armone and Gallo contend that the government failed to comply with this restriction, and thus, all of the Ruggiero surveillance should be suppressed. We disagree.

Title 18 U.S.C. § 2518(10)(a)(iii) provides that "[a]ny aggrieved person" may make a motion to suppress wiretap evidence when "the interception was not made in conformity with the order of authorization." This provision, however, is to be construed in accordance with standing requirements usually applied to suppression claims under the fourth amendment. *Alderman v. United States*, 394 U.S. 165, 175-76 & n.9 (1969); *see* S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2179-80. The Supreme Court has held that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman*, 394 U.S. at 171-72. Here, the arguments advanced by Armone and Gallo do no more than assert Ruggiero's own right to minimize the surveillance of his home and phone. Defendants were not named as targets of the surveillance, nor were they part of the conversations that allegedly exceeded the restrictions contained in the authorizing order. Applying the usual standards governing claims of fourth amendment violations, we find that Armone and Gallo lack standing to contest the Ruggiero surveillance. *See United States v. Fury*, 554 F.2d 522, 526 (2d Cir.), *cert. denied*, 433 U.S. 910 (1977).

4. Sealing

Finally, defendants contend that evidence derived from both locations should be suppressed because of improper delays in sealing the tapes made of the surveillance. Title 18 U.S.C. § 2518(8)(a) requires that tapes made by electronic surveillance be sealed "[i]mmediately upon the expiration of the period of the order, or extensions thereof." Appellants' arguments are based on a misunderstanding of when the periods of the orders terminated. This court has previously determined that "extensions,"

> as used in the phrase "period of the order, or extensions thereof" is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however designated, where the surveillance involves the same telephone, the same premises, the same crimes, and substantially the same persons.

United States v. Vasquez, 605 F.2d 1269, 1278 (2d Cir.), *cert. denied*, 444 U.S. 981 (1979). Defendants' claims that there were delays in sealing tapes upon the expiration of some of the intermediate orders thus are not determinative of the issue before us. Evaluation of the orders issued shows that the Castellano home was subject to "consecutive continuations" of the wiretap order. Thus, the period of the order authorizing the Castellano surveillance ended with the termination of the final order on August 4, 1983. Since all of the Castellano tapes were sealed by August 2, 1983, the district court's denial of defendants' motion to suppress was proper.

The Ruggiero surveillance was conducted pursuant to six authorizing orders which fall into two groups, one covering the period from November 9, 1981 to March 6, 1982, and one covering the period from April 5, 1982 to July 7, 1982. In a related case, this court examined a sealing delay following the period ending July 7, 1982,

and determined that the surveillance should not be suppressed. *See United States v. Massino*, 784 F.2d 153 (2d Cir. 1986). On this appeal, Armone and Gallo contend that the sealing requirement was triggered by the expiration of an intermediate order on January 28, 1982. However, evaluation of the orders expiring on January 28, and beginning on February 4, show them to be "consecutive continuations" of the same wiretap order. Accordingly, we find the date of expiration which triggered the sealing requirement for the Ruggiero surveillance to be March 6, 1982.

Defendants next contend that the Ruggiero surveillance should be suppressed because it was not sealed until March 11, 1982. We disagree. It is well settled in this circuit that suppression is not automatically warranted when sealing is not immediate; rather, suppression is required when the government cannot satisfactorily explain the delay. *See, e.g., Massino*, 784 F.2d at 157; *United States v. McGrath*, 622 F.2d 36, 42 (2d Cir. 1980); *United States v. Gigante*, 538 F.2d 502, 504 (2d Cir. 1976). The government's explanation must be weighed against such factors as the length of delay, the absence of good faith, the time needed for administrative processing, and the prejudice to the defendant. *See Massino*, 784 F.2d at 157. We find that the government has satisfactorily explained the five-day sealing delay that occurred here. The authorizing order expired on March 6, 1982 -- a Saturday -- rendering any action by the government on the next day impossible. The government then required 3 days -- March 8, 9, and 10 -- for administrative processing, and the tapes were sealed on March 11, 1982. The record contains no evidence of bad faith on the part of the government, or of prejudice incurred on the part of the appellants. We therefore find no error in the district court's denial of defendants' motion to suppress the fruits of the Ruggiero surveillance.

E. Restriction of the cross-examination of Yudzevich.

Armone and Gallo contend that the district court abused its discretion by limiting the cross-examination of government-witness George Yudzevich. In a case pending in California, Yudzevich was charged with the commission of various crimes. Armone and Gallo argue that the trial court's decision to limit the cross-examination concerning these charges, along with an instruction to the jury to assume Yudzevich's guilt concerning the charges, deprived them of a fair trial. We disagree.

A district court has broad discretion over the scope of cross-examination. *See United States v. Bari*, 750 F.2d 1169, 1178 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019 (1985). This discretion "includes reasonable control to make the interrogation ... effective for the ascertainment of the truth and to avoid needless consumption of time." *United States v. Clark*, 613 F.2d 391, 407 (2d Cir. 1979), *cert. denied*, 449 U.S. 820 (1980). An exercise of this discretion will not be overturned absent a clear showing of abuse. *See Bari*, 750 F.2d at 1178.

Cross-examination of Yudzevich consumed three days. In reponse to questioning, Yudzevich admitted that he had committed numerous crimes over the years. In regard to questions about the charges pending in California, however, Yudzevich invoked his fifth amendment privilege against self-incrimination. After balancing the defendants' sixth amendment rights to test the credibility of the witness against them, and Yudzevich's fifth amendment rights, the district court instructed the jury that they were to assume that Yudzevich was guilty of the crimes charged in California. Further cross-examination regarding the California charges could do no more than establish Yudzevich's guilt -- an issue already settled by the trial court's instruction. The trial court's determination that such

questioning would unnecessarily prolong the trial was well within its discretion and will not be disturbed.

F. Denial of motion for a separate trial.

Migliorisi contends that the trial court abused its discretion in denying his motion for a separate trial. Specifically, Migliorisi argues that he was deprived of a fair trial when the district court offered him the choice of proceeding separately in May 1987, or as a co-defendant in September 1987, because his counsel of choice was unavailable in May 1987. This contention is without merit.

A trial court has wide discretion in considering a motion to sever pursuant to Fed. R. Crim. P. 14. *United States v. Sliker*, 751 F.2d 477, 492 (2d Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985). In order to demonstrate an abuse of this discretion, a defendant bears the "extremely difficult burden" of showing that substantial prejudice resulted from the denial of the motion. *United States v. Werner*, 620 F.2d 922, 928 (2d Cir. 1980). It must further be shown that the prejudice resulted from the joinder, not merely that the defendant "might have had a better chance for acquittal at a separate trial." *United States v. Rucker*, 586 F.2d 899, 902 (2d Cir. 1978).

Migliorisi and various other of the 16 original co-defendants in this case made motions to sever. The district court granted the motions in part, resulting in seven trials. *United States v. Gallo*, 668 F. Supp. 736 (E.D.N.Y. 1987). Judge Weinstein determined that Migliorisi would be prejudiced if tried together with all 16 co-defendants, but that no prejudice would result from being tried along with Vitta, Armone, and Gallo. Having made that determination, the court offered Migliorisi the option of going to trial individually in May, when the court had an opening, or proceeding with the group in September. Migliorisi chose to proceed in September.

Migliorisi's contention that this was "no choice," since counsel of his choice was unavailable in May, misses the mark. His arguments are of the nature that he might have had a better chance for acquittal had he been tried alone. Migliorisi, however, has shown no prejudice suffered as a result of his being tried along with the other defendants here. Accordingly, we find the denial of Migliorisi's severance motion, to the extent he sought to be tried alone, to be a proper exercise of the district court's discretion.

CONCLUSION

We have considered the appellants' remaining arguments and find that each of them is without merit. In light of the foregoing, the judgments of conviction are in all respects

Affirmed.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing *In Banc*

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Fourth day of January, one thousand nine hundred and Eighty-Nine.

FILED: January 4, 1989

DOCKET NO. 88-1066

UNITED STATES OF AMERICA,
Appellee,

-against-

ANTHONY VITTA, JOSEPH ARMONE, SALVATORE MIGLIORISI and JOSEPH GALLO,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants, Joseph Gallo and Joseph Armone.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

/s/ _____
By: Fred M. Cassidy,
Chief Deputy Clerk

Appendix C
Order of United States Court of Appeals on Motion to Stay Mandates

UNITED STATES OF AMERICA,

-against-

ANTHONY VITTA, JOSEPH ARMONE, SALVATORE MIGLIORISI and JOSEPH GALLO,

Defendants-Appellants.

88-1066; 1073; 1074; 1072

NOTICE OF MOTION
for Stay of Mandates of Appellants
Joseph N. Gallo & Joseph Armone

FILED: JANUARY 11, 1989

MOTION BY:

JOHN L. POLLOK, ESQ.
HOFFMAN & POLLOK
605 Third Avenue
New York, New York 10158

Has consent of opposing counsel:		
A. been sought?	☒ Yes	☐ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☐ Yes	☐ No
Is oral argument desired?	☐ Yes	☐ No

Requested return date:

Has argument date of appeal been set:		
A. by scheduling order?	☒ Yes	☐ No
B. by firm date of argument notice?	☐ Yes	☐ No
C. If Yes, enter date:	September 26, 1988	

Appendix C
Order of United States Court of Appeals
on Motion to Stay Mandates

OPPOSING COUNSEL:

MAURY S. EPNER, ESQ.
Appellate Section, Criminal Division
Department of Justice, P.O. Box 899
Ben Franklin Station,
Washington, D.C. 20044-0899
and
DOUGLAS GROVER, AUSA (718) 330-7081

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not: Appeal has been denied by this Court (Oakes, Miner, & Altimari).
Petition for Rehearing with Suggestion for Rehearing En Banc has been denied.

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:

Brief statement of the relief requested:
Stay of Mandates of Appellants, Joseph N. Gallo and Joseph Armone, and if mandates have already issued, recall of the said mandates pending timely application to the Supreme Court of the United States for a Writ of Certiorari.

Appendix C
Order of United States Court of Appeals
on Motion to Stay Mandates

By:	Appearing For:	
/s/ _____	Joseph N. Gallo and Joseph Armone	*Defendants-Appellants*
JOHN L. POLLOK	January 11, 1989	

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

FILED: JANUARY 18, 1989

/s/ _____

/s/ _____

/s/ _____

1-18-89

Appendix D
Order of United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER
86 Cr. 452 (JBW)

UNITED STATES OF AMERICA,

-v-

JOSEPH N. GALLO, et al.,

Defendants.

This matter having come before the Court on a motion by the defendant, Joseph N. Gallo, seeking an Order to dismiss the indictment based upon his claim that he has immunity from prosecution and, alternatively, for an Order directing a pretrial hearing on the issue as to whether the Government used immunized testimony in the grand jury to obtain the indictment, or intends to use it at trial, and the Court having considered the affidavits and papers of both parties, it is hereby

ORDERED that the defendant, Joseph N. Gallo's, motion for dismissal of his indictment based upon his claim that he has immunity from prosecution is denied, with leave to renew after trial, and it is further

ORDERED that defendant's motion for a pretrial hearing to determine whether the Government has utilized any of his immunized testimony before the grand jury, or intends to do so at trial, is granted, and the motion to dismiss the indictment is denied, ordered that defendant may move for a post-trial hearing, if needed, on the issue as to whether the Government utilized, or will have utilized, the defendant's immunized grand jury testimony before the grand jury, and before the trial jury.

Appendix D
Order of United States District Court

SO ORDERED:

Dated: 4/20/87

/s/ _____
Jack B. Weinstein
Chief, United States District Judge

Appendix E
Finding of Fact and Law of United States District Court

MR. AMOROSA: I have nothing further of this witness.

* * *

(39) THE COURT: Thank you. The hearing is now closed.

The following constitutes the court's findings of fact and law: The court now considered the entire court trial record and post-trial hearing held today as well as the pretrial hearing.

All of this information is used in coming to the conclusion it will now make.

The court credits the witnesses who testified for the government. It believes them credible and honest.

The government did not directly or indirectly use any of Mr. Gallo's grand jury testimony in this prosecution.

It received no leads from such testimony.

All the information that was used by the government in this prosecution came to its attention from independent sources.

All the information it had would have been obtained from independent sources whether or not Mr. Gallo testified.

The Kastigar motion is denied.

Any other findings of fact or law anybody wishes me to make?

(40) MR. FRIEDMAN: None by the Government.

MR. AMOROSA: No, sir.

THE COURT: Thank you, gentlemen.

MR. AMOROSA: I would ask Your Honor to grand [sic] the motion.

THE COURT: Thank you.